Editor's Note: **Appeal filed -- Civ No. A84-245 (D. Alaska June 22, 1984).**

FREDERICK HOWARD

IBLA 82-204 Decided September 20, 1982

Appeal from decision of the Alaska State Office, Bureau of Land Management, denying a request for reinstatement of Native allotment application F-385 (Anch.).

Vacated and remanded.

1. Alaska: Native Allotments

> In sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), Congress provided that all Native allotment applications which were pending before the Department on Dec. 18, 1971, which describe either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve--Alaska, are approved on the 180th day following the effective date of that Act subject to valid existing rights, unless otherwise provided by other paragraphs or subsections of that section. Termination after Dec. 18, 1971, of an otherwise acceptable allotment application filed before that date for failure to submit evidence of use and occupancy does not bar approval of the application under that provision. Where such an application was pending on Dec. 18, 1971, and BLM has refused to reinstate and approve the application, the case will be remanded to the Alaska State Office to be held for approval pursuant to section 905 of the Alaska National Interest Lands Conservation Act.

APPEARANCES: Craig J. Tillery, Esq., Anchorage, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Frederick Howard has appealed a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 16, 1981, denying his request filed December 15, 1980, for reinstatement of Native allotment application F-385 (Anch.).

Appellant submitted his Native allotment application on December 22, 1966, pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed December 18, 1971, subject to applications pending before the Department on that date, 43 U.S.C. § 1617 (1976)), for two parcels of land containing an aggregate of approximately 40 acres located in secs. 22 (parcel B, cabin site) and 27 (parcel A, fishwheel site), T. 33 N., R. 57 W., Seward meridian. The Bureau of Indian Affairs had certified as of December 16, 1966, that appellant was a Native entitled to an allotment and that he had occupied, marked, and posted the lands as stated in the application. The application reflects that appellant's occupancy of the desired lands had begun in June 1964 but did not show evidence of required 5 years' use and occupancy. See 43 CFR 2561.0-5(b). 43 CFR 2561.1(f), however, provides that an applicant may submit proof of the necessary use within 6 years of filing his application.

On April 4, 1967, BLM issued a decision notifying appellant that his application was acceptable though subject to an oil and gas reservation and that his evidence of 5 years' use and occupancy of the described lands was due by December 22, 1972. On June 19, 1972, BLM sent appellant a notice reminding him that his evidence of occupancy was due on December 22, 1972. Appellant made no response and BLM sent a final notice to him dated April 23, 1973, indicating that the application terminated for failure to file evidence of use and occupancy within the required 6 years from the date of submission of his application. See 43 CFR 2561.1(f).

On December 15, 1980, appellant requested reinstatement of his application based on section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371, 2435 (1980), and Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). 1/ In the copy of the decision received by appellant, BLM stated its reasons for rejecting his request for reinstatement as follows:

> Section 905 of the Alaska Lands Bill of December 2, 1980 provides no relief for Native Allotment applicants who failed to file the required proof of use and occupancy. Those applications which were not filed properly under Departmental regulations promulgated from the provisions of the Native Allotment Act

1/ In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the court held that Native allotment applicants were entitled to notice and opportunity for hearing where there was an issue of fact with respect to an applicant's qualifications.

> of May 17, 1906 (34 Stat. 197, as amended), are not considered to be subject to legislative approval since the life of the application expired on December 22, 1972.
>
> In view of the above, the request for reinstatement must be denied, since the closure of the case was a lawful rejection for failure to supply the required 5-years proof of use and occupancy. 2/

[1] Section 905(a)(1) of ANILCA provides that

> [s]ubject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended), which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska * * * are hereby approved on the one hundred and eightieth day following [December 2, 1980],

except in certain circumstances where applications remain subject to adjudication under the Alaska Native Allotment Act as provided by other paragraphs of section 905(a).

Counsel for BLM argues that only those cases where applications were erroneously rejected are subject to reinstatement and approval under section 905(a) of ANILCA and refers to legislative history in S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), as authority for this interpretation. Counsel asserts that appellant is not due a Pence hearing because his application was terminated for the legal reason that he failed to file his evidence of use and occupancy, not on the basis of disputed issues of fact and, therefore, having been properly closed, the case is not subject to reinstatement and approval under ANILCA.

The cited legislative history reads:

> An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications

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2/ We note without comment that the copy of the Nov. 16, 1981, decision contained in the case file received from BLM states a different version of its reason for denying reinstatement:

"The recently enacted Alaska Lands Bill of December 2, 1980, provides no relief for Native allotment applicants who failed to file the required proof. In fact, the legislative history of Section 905 indicates that only those applications which had been unlawfully closed were to be considered. In view of the above, the request for reinstatement must be denied, since the closure of the case was a lawful rejection for failure to supply the required 5-years proof of use and occupancy."

> which were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section.

S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in [1980] U.S. Code Cong. & Ad. News 5182. The amendment referred to is the addition of the phrase "or before." Earlier versions of the legislation read simply "applications * * * which were pending before the Department of the Interior on December 18, 1971." (Emphasis added.) See, e.g., section 805(a), H.R. 39 as reported in H. Rep. No. 97, Part I, 96th Cong., 1st Sess. 66 (1979). BLM apparently interprets the clarifying statement as meaning that only erroneously rejected applications regardless of when they were rejected shall be reinstated and approved or adjudicated.

We find that the legislative history supports quite a different interpretation. Prior to the addition of the words "or before" the provision clearly stated that all applications that were pending before the Department on December 18, 1971, were to be approved or adjudicated as circumstances required. By its own terms the Senate report clarification of the amendment directs attention to applications "rejected by the Secretary prior to December 18, 1971," in addition to those pending on December 18, 1971.

Therefore, we need not address the "or before" language further in this case. Appellant's application was unquestionably pending on December 18, 1971, as BLM did not and indeed could not close the case before December 21, 1972, when appellant's 6-year period for filing evidence of use and occupancy ended. Appellant's application was not rejected, erroneously or otherwise, "before" or "prior to" December 18, 1971. Thus, the "or before" language and the Senate report explanation of its meaning is not applicable to appellant's allotment application. There is no indication in the legislative history that Congress intended to approve only applications pending on December 18, 1971, that had not been properly disposed of upon passage of ANILCA.

The record reflects no reason why appellant's allotment application should not be approved under section 905(a) of ANILCA. There appear to be no valid existing rights in conflict with the application and the selected land was not reserved on December 13, 1968. Congress intended to summarily approve all allotment applications meeting the conditions of section 905(a)(1) where no countervailing interest requires full adjudication. S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in [1980] U.S. Code Cong. & Ad. News 5182. Thus, failure to provide evidence of use and occupancy does not bar approval of an otherwise acceptable application which was pending before the Department on December 18, 1971. Cf. Nina Harris, 63 IBLA 74 (1982) (use and occupancy inadequate). Therefore, BLM should hold appellant's application for approval, subject to the identification of any circumstances as specified in section 905 which would preclude automatic approval and would require adjudication pursuant to the provisions of the Alaska Native Allotment Act.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is vacated, allotment application F-385 (Anch.) is reinstated, and the case is remanded for further action consistent with this opinion.

Will A. Irwin
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge